

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAILED

OCT 27 2005

U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MELDON L. TALBOT

Appeal No. 2005-1603
Application No. 09/706,992

ON BRIEF

Before FRANKFORT, McQUADE and NASE, Administrative Patent Judges.

Per curiam

DECISION ON APPEAL

Meldon L. Talbot appeals from the final rejection (mailed October 1, 2002) of claims 1 through 12, all of the claims pending in the application.

THE INVENTION

The invention relates to an orthopedic ankle brace and to a method of using same. Representative claims 1 and 5 read as follows:

1. A single strap ankle brace comprising a strap having a first and a second end,

wherein said single strap ankle brace is made of a flexible substantially inelastic web of fabric,

an array of plastic hooks disposed at only one of said first and second ends of said strap,

an array of plastic loops for engaging said array of plastic hooks, said array of plastic loops being spaced on a surface of said strap,

wherein said array of plastic hooks is separated and spaced apart on said strap from said array of plastic loops such that said array of plastic hooks and array of plastic loops may be pressed together when said strap is wrapped about the ankle and foot in a figure eight configuration which exposes said array of plastic loops, and

wherein said figure eight configuration comprises a beginning end positioned at the inside of the ankle, crosses over the medial arch, loops below the foot in front of the heel, crosses over itself above the medial arch, and loops around the back of the ankle and fastens to itself at said beginning end of said figure eight configuration at the inside of the ankle.

5. A method for bracing an ankle and associated foot which comprises:

(i) providing the single strap ankle brace of claim 1;

(ii) wrapping said single strap ankle brace around the ankle and associated foot in a figure eight configuration, wherein said wrapping comprises:

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(a) positioning said end of said strap on which no array of plastic hooks is disposed;

(b) then passing a length of said strap at least once around the foot passing under the foot in front of the heel to provide one loop of said figure eight configuration then passing across a section of said strap above the foot and then around the back of the ankle to provide the other loop of said figure eight configuration,

wherein said wrapping exposes said array of plastic loops, and

wherein said wrapping provides a free end of said strap upon which an array of plastic hooks is disposed; and

(iii) pressing said array of plastic loops exposed by said wrapping together with said array of plastic hooks on said free end of said strap.

THE EVIDENCE

The items relied on by the examiner as evidence of obviousness are:

Wise	3,777,751	Dec. 11, 1973
Castiglia	4,085,746	Apr. 25, 1978

The item relied on by the appellant as evidence of non-obviousness is:

The 37 CFR § 1.132 Declaration of Meldon L. Talbot filed November 9, 2001.

THE REJECTION

Claims 1 through 12 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Castiglia in view of Wise.

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Attention is directed to the brief (filed February 25, 2003) and answer (mailed May 21, 2003) for the respective positions of the appellant and examiner regarding the merits of this rejection.

DISCUSSION

I. Preliminary Matter

The appellant has raised on appeal the question of whether the final rejection was premature due to its silence regarding the aforementioned 37 C.F.R. § 1.132 declaration (see page 2 in the brief). This matter, however, is not directly connected with the merits of the appealed rejection and therefore is reviewable by petition to the Director rather than by appeal to this Board. See In re Hengehold, 440 F.2d 1395, 1403-1404, 169 USPQ 473, 479 (CCPA 1971). Accordingly, we shall not address it further in this decision.

II. The merits of the examiner's rejection

Castiglia, the examiner's primary reference, discloses an ankle wrap 10 composed of an elongate elastic panel 11 having Velcro® fastening elements 16, 20, 21 and 23 selectively disposed along the length thereof to permit wrapping of an ankle and instep. Figures 1 and 2 show the wrap in an extended condition and Figures 3 through 9 depict the various steps in which the wrap is applied

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to an ankle with hook portions 16 and 21 ultimately engaged with loop portions 20 and 23, respectively.

The examiner concedes that Castiglia does not respond to the limitations in independent claims 1, 5, 6, 7, 11 and 12 requiring a single strap ankle brace made of a flexible web of fabric that is "substantially inelastic."

Wise discloses an ankle support. Figure 1 shows the support 10 as composed of an annular band 12 and connected strap 14 made of flexible, inelastic material. Figures 2 through 4 illustrate the manner in which the band is placed around a foot and the strap 14 is wrapped around the bottom of the foot and then taped in place on the opposite side of the ankle. Figure 5 shows an alternate embodiment 50 comprising a single, flexible, inelastic web 51 bearing Velcro® fasteners at portions 56 and 58.

Combining Castiglia and Wise to reject claims 1 through 12, the examiner submits that it would have been obvious "to substitute the flexible, inelastic material taught by Wise in place of the elastic strap disclosed by Castiglia to provide better support and acceptable levels of comfort when the strap is wrapped in a figure eight position about the foot and ankle" (answer, page 5).

Castiglia, however, does not provide any hint that elastic material used in the context of an ankle wrap lacks comfort or support, and Wise does not indicate that inelastic material affords better comfort or support than elastic material. Thus, the combined teachings of Castiglia and Wise fail to substantiate the examiner's reasoning as to why it would have been obvious to combine the two references in the manner proposed. Indeed, Castiglia's focus on ankle wraps that are elastic (see column 1, lines 32 through 35) and teaching that the particular wrap disclosed therein should be stretched taut when applied seemingly belies the examiner's rationale and arguably leads away from the proposed modification. In this light, it is evident that the only suggestion for selectively piecing together the features of Castiglia and Wise in the manner proposed by the examiner stems from hindsight knowledge impermissibly derived from the appellant's disclosure.¹

Consequently, we shall not sustain the standing 35 U.S.C.

¹ As the references applied by the examiner fail to establish a prima facie case of obviousness with respect to the subject matter on appeal, there is no need to go into the merits of the appellant's declaration evidence of non-obviousness.

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§ 103(a) rejection of independent claims 1, 5, 6, 7, 11 and 12, and dependent claims 2 through 4 and 8 through 10, as being unpatentable over Castiglia in view of Wise.

SUMMARY

The decision of the examiner to reject claims 1 through 12 is reversed.

REVERSED

Charles E. Frankfort

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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John P. McQuade

JOHN P. MCQUADE)
Administrative Patent Judge)
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Jeffrey V. Nase

JEFFREY V. NASE)
Administrative Patent Judge)
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Meldon L. Talbot
4671 Devonshire Street
Boulder, CO 80301